

## **AVOIDING EMPLOYEE LITIGATION**

Today, a very little amount of the American work force belongs to unions. One reason that unions have had little success in organizing office workers is that newly available means of protesting discharge through our judicial system simply has rendered unions less important as a determining factor in job security.

Most employers are by now aware of the laws that protect employees against discriminatory treatment based on protected status. Therefore, if a terminated employee is more than 40 years old, there is grounds for a claim that age was a factor in the termination decision. The terminated employee might make the same sort of claim based on race, religion or physical handicap. If an unhappy ex-employee can show that any of those factors or a variety of others made a difference in selection for termination, there may be entitlement to money damages, and perhaps to reinstatement of the old job.

In addition to protection against unlawful discrimination, however, there has been an explosion of other employment litigation in recent years under other liability theories, most of it caused by terminated white-collar employees.

These suits have been based on alleged contracts arising out of garden-variety handbooks; "harmless" statements made in recruiting and post hire assurances of job security. In defending against such a lawsuit, the employer may be hard pressed to explain why an employee was suddenly discharged when job performance was basically unchanged over many years.

The point of it all is that whenever a terminated employee feels unfairly treated and leaves the company bitter, angry and afraid for his or her economic future, our legal system provides many avenues to get even, and many lawyers eager to take the case.

Rather than kicking an employee out the door in a fashion designed to aggravate the chances that he or she will take the former company to court, the transition can be handled in a fashion designed to minimize bitterness and the prospect of litigation. Termination will never be a cause for the employee to celebrate, but it can be made at least understandable and perhaps palatable.

If the employee has been a drain on the company for years, a few more months probably will not make the difference between survival and Chapter 11. The employee is probably aware of not having been very productive but may never have been told that directly.

If told where he or she stands and then given a specified time to turn the situation around, the employee will at least have time to adjust to the idea of losing the job and may be grateful for a last chance opportunity. If successful, the employee may be better than an untried replacement. If the employee fails, he or she will be less likely to proceed directly to his or her lawyer's office.

As an alternative, outplacement assistance may be successful in finding another job even before termination, thus avoiding the uncertainty accompanying an interruption in personal income stream. Continuation of an employee on the payroll after he or she becomes aware of the prospect of termination provides an opportunity to plan for the day paychecks will stop. From a psychological standpoint, outplacement assistance may

serve to persuade the employee that the company is not trying to destroy him or her in taking away the job.

This assistance may either involve hiring a paid consulting agency to provide a structured program of resume preparation, counseling and referral, or may simply mean allowing the employee to continue to use an office, telephone and clerical support to look for another job.

On the other hand, the company may feel it would be bad for morale (or even an invitation to sabotage) to let the employee remain in the office knowing employment days are numbered. In that situation, a severance payment based on some rational formula may soften the economic and psychological impact of termination. Additionally, health and life insurance coverage may be extended at company expense.

In fact, the possibilities for assisting an employee are limited only by the employer's imagination and willingness to assume some limited continuing expense over a pre-set period. If that assistance avoids litigation, it is beneficial, since legal fees for defending even a meritless action can mount quickly.

Obviously, the effectiveness of efforts to avoid post-termination litigation depends almost entirely on the subjective attitude of the terminated employee. He or she might feel better and still sue.

However, to the extent that the benefits afforded are not provided under established policies, that a terminated employee can claim as a matter of right, objective protection against litigation can be secured by insisting that, in exchange for the severance payments and other assistance, the employee sign a resignation and release agreement designed to preclude litigation.

Typically, such a release agreement should state the consideration involved and should recognize that, without the agreement, the employee would not be entitled to that consideration.

While not legally required, the agreement may be drafted to preserve unemployment compensation benefits or other rights. Additionally, the agreement can specify the wording of any letter of recommendation or reference that may be provided. In short, the release agreement may be tailored to fit the legitimate interests of both the employer and the employee.

Obviously, the incentive to the employee to enter such an agreement is that he or she would not receive the additional benefits without it. The incentive to the employer is that, by spending a limited amount on severance payments, the employer gains a substantial measure of protection against open-ended liability and heavy legal fees that could result if the employee decides to sue. Disgruntled white-collar employees are doing just that with increasing frequency, but some simple common sense and compassion, backed up with a tightly drawn agreement, can help avoid ending up on the business end of a summons.

Source: Antione Turner, Total Rewards Insurance Agency